No. 85-656

IN THE
SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1985

SECRETARY OF STATE OF THE STATE OF WASHINGTON,
RALPH MUNRO,

Appellant.

v.

SOCIALIST WORKERS PARTY, et al.

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 15, 1985
JURISDICTION NOTED JANUARY 13, 1986

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C83

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

I. INTRODUCTION

This is an action for Declaratory and Injunctive Relief. Plaintiffs are asking the Court to declare unconstitutional certain provisions of the election laws of the State of Washington adopted in 1977, codified at RCW 29.18.110. These amendments have since their adoption effectively barred all minor parties from participating in general elections for state-wide office. Specifically, the law as applied to the current senatorial election unjustifiably narrows participation from the three parties who have legally nominated candidates to the two major parties, excluding Plaintiff Dean Peoples from the general election ballot. The prior law operated successfully for 70 years to permit the participation of minor parties in general elections, from its enactment in 1907 until its amendment in 1977. The new restrictions are unnecessary, unreasonable, and unconstitutional, and must be struck down.

II. JURISDICTION

This court has jurisdiction under the First and Fourteenth Amendments to the United States Constitution, 28 U.S.C. 1331, 1343, 1357, 2201, 2202 and 42 U.S.C. 1981 and 1983.

III. PLAINTIFFS

3.1 Plaintiff Socialist Workers Party has regularly attempted, since its formation in 1938, to gain general election ballot placement for its candidates. It was frequently successful in this endeavor in the State of Washington until the amendment of RCW 29.18.110 in 1977, and has been unsuccessful since then, in state-wide races, and will probably continue to be unsuccessful in the future, as have all minor parties, until this law is struck down. The Socialist Workers Party campaigns on such issues as full civil rights for Blacks and other oppressed minorities; for equal rights for women; against U.S. military adventures in Central America and elsewhere; for unilaterial U.S. disarmament; and for the formation of an independent labor party based on the power of the industrial unions to represent the interests of working people.

3.2 Plaintiffs Leroy Watson and Louise Pittell are Washington voters. Louise Pittell is not a member of the Socialist Workers Party, but wants the name of the Socialist Workers Party candidate to be placed on the general election ballot so that the issues raised by the Party will be addressed by the various candidates, in the news media and public forums and among the electorate generally, and so that voters will not be limited to a choice between a Democrat and a Republican, but may effectively vote for the Socialist Workers Party candidate should they so decide at the general election.

3.3 Plaintiff Candidate Dean Peoples is a member of the Socialist Workers Party and the party's candidate for United States Senate in the 1983 election, who was

nominated for the office under the provisions of state law, RCW 29.24, but who will be excluded from the general election ballot pursuant to the provisions of RCW 29.18.

IV. DEFENDANTS

Defendant Secretary of State, Ralph Munro, is the chief election officer of the state and has supervisory control over election officials in the performance of their duties, pursuant to RCW 29.

V. FACTS

5.1 Socialist Workers Party candidates have appeared on the Washington State ballot in every presidential election but one since 1948, winning ballot placement in these elections by holding conventions and filing with the Secretary of State petitions bearing the signatures of registered voters of the State as provided by RCW 29.24.

5.2 Other minor parties have also availed themselves of this method of qualification for the general election ballot, giving the voters of the State of Washington a variety of choices in the general election. This system functioned successfully and never resulted in a ballot clogged by "too many" parties, and has never caused voter confusion or otherwise impaired the integrity of the electoral process.

5.3 The laws of the First Extraordinary Session, 1977, Chapter 329, Section 11, effective June 30, 1977, added a new requirement for political parties to obtain a place on the general election ballot to the previous procedure. The Act retained the convention and signature requirements, but provided that the fulfillment of the previous requirements for general election ballot placement now entitled minor party candidates only to a place on the primary ballot. In order to be placed on the general election ballot in November, each candidate is now required to win votes in the primary election in which the

numerous competitors for the Democratic and Republican nomination are competing against each other, equalling at least one percent of the total number of votes cast for all candidates seeking nomination for the position sought. Voters in the primary thus may vote either for one of the candidates seeking the Democratic or Republican nomination for the office, or, in the alternative, cast their vote for ballot placement on the general election ballot of one of the minor parties, which has already nominated its single candidate for the office. In the October special Senatorial primary this resulted in the Socialist Workers Party candidate Plaintiff Peoples competing for votes against 32 Democrats and Republicans, though there was no question who would be the Socialist Workers Party nominee for the general election.

5.4 In the elections following the enactment of these amendments to RCW 29.18, the Socialist Workers Party has made diligent efforts to get votes on primary day to win the prescribed percentage of the primary vote in order to obtain general election ballot placement.

5.5 On information and belief, other minor parties seeking general election ballot placement have also attempted to win the prescribed percentage of the primary vote.

5.6 In no case since the change in the law has any minor party ever succeeded in achieving general election ballot placement for a single candidate in any state-wide race since the change in the law.

5.7 In many of these races, from one to several minor parties fulfilled all of the previous requirements for placement on the general election ballot, and thus were placed instead on the primary ballot. But in each case the effect of the changed law barred them from placement on the general election ballot. In no case would inclusion of all of the qualified minor party candidates on the general election ballot have had any adverse effects on the integrity of the electoral process.

VI. DENIAL OF BALLOT ACCRESS AND EFFECTIVE VOTE

6.1 Because the primary vote requirement of RCW 29.18.110 creates an insurmountable barrier to minor party placement on the general election ballot, Plaintiff Socialist Workers Party will be denied access to public forums, debates, news media coverage, and other avenues of reaching the electorate with its ideas, and its right to associate for the advancement of these ideas and to increase its electoral support will be seriously impaired.

6.2 Because the primary vote requirement of RCW 29.18.110 will bar the Socialist Workers Party from general ballot placement, Plaintiffs Leroy Watson and Louise Pittell will be deprived of their right to exercise effectively the franchise, to associate for the advancement of their political beliefs, and to have the issues raised by the Socialist Workers Party or any other minor party, addressed by the various candidates, in the news media, in public forums, and among the electorate in general. The issues raised in the campaign and the choices available from the general election ballot will be limited to the differences between the Democratic and the Republican party.

VII. CONSTITUTIONAL VIOLATIONS

7.1 Defendants' failure to accept the Socialist Workers Party's demonstration of community support entitling it to general election ballot placement by the traditional convention and petition process, or in any other way than by running in the primary for a percentage of the primary vote, is unnecessary and unreasonable, and denies and unlawfully interferes with Plaintiffs' rights to exercise the franchise effectively and to associate for the advancement of ideas, in violation of the First and Fourteenth Amendments to the United States Constitution and Article 1, Sections 1, 3, 4, 5, 12, 19, and 32 of the Constitution of the State of Washington.

VIII. PRELIMINARY RELIEF REQUIRED

Plaintiffs have no adequate remedy other than this law suit and will be irreparably injured unless preliminary relief is granted by this Court ordering placement of the Socialist Workers Party candidate on the general election ballot for the Senatorial election November 8.

IX. REMEDIES REQUESTED

WEREFORE, Plaintiffs request that the Court:

9.1 Declare the provisions of RCW 29.18.110 unconstitutional insofar as they deprive the Socialist Workers Party of any alternative opportunity to achieve ballot placement other than by winning a percentage of the primary vote;

9.2 Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 declaring RCW 29.18.110 invalid and unconstitutional as applied to keep legitimate minor parties off the general election ballot;

9.3 Preliminarily and permanently enjoin the Defendant from enforcing the provisions of RCW 29.18.110 requiring candidates to win a percentage of the primary vote in order to gain placement on the general election ballot;

9.4 Issue a preliminary injunction directing the Defendant to place the name of the lawfully nominated Socialist Workers Party candidate for U.S. Senate on the November 8th general election ballot;

9.5 Award Plaintiffs attorney's fees, costs, and such other relief as the Court may deem just.

DATED this _____ day of October, 1983.

DANIEL HOYT SMITH, P.S.
Attorney for Plaintiffs

/s/ _____
Daniel Hoyt Smith

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
January 6, 1983

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

Plaintiffs, through their attorney of record, hereby move for a Summary Judgment in their favor upon all claims raised in their Complaint.

This motion is based upon the files and records herein, including the Complaint, Plaintiffs' Memorandum in Support of Preliminary Injunction, Plaintiffs' Reply to Defendant's Opposition to Preliminary Injunction, Affidavit of Ivan King, Affidavit of Dean Peoples, Affidavit of Don Whiting, Defendant's Memorandum in Opposition to Motion for Preliminary Injunction, the Plaintiffs' Memorandum in Support of Summary Judgment which is being filed together with this motion, and the Affidavit of Lisa Hickler which is also being filed together with this motion.

The pleadings, affidavits, and other documents on file show that there is no genuine issue as to any material fact

and that the Plaintiffs are entitled to judgment as a matter of law.

DATED December 9, 1983.

DANIEL HOYT SMITH, P.S.
Attorney for Plaintiffs

/s/ _____
Daniel Hoyt Smith

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF SUMMARY JUDGMENT

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

I. PERTINENT FACTS

Prior History. There is no evidence to indicate that, in the recorded history of elections in the State of Washington prior to the 1977 imposition of the ballot access restrictions challenged here, there has ever been a problem with a "cluttered ballot," "voter confusion," or the frustration of the democratic process by "frivolous or fraudulent candidacies."

The Socialist Workers Party is not a frivolous or fraudulent party. It has been a nationally organized, serious political party for over forty years. Its candidates have regularly participated in national elections in the majority of states in the union. Its candidates for national and local office have regularly participated in elections in the State of Washington, and have regularly achieved ballot placement prior to the 1977 amendments. The Party's campaigns are conducted by earnest and experienced political activists who are recognized, interviewed and written about by the news media and invited to speak and participate by many organizations. They espouse a serious political program and address important

issues pertaining to race, economics, and government. *See* Affidavit of Lisa Hickler, and attachments thereto.

There is no evidence on the record that the placement of the Socialist Workers Party candidates on the ballot has ever in the past or will in any way in the future impair the ability of the electorate to make rational decisions in the polling booth. On the contrary, the candidates' participation in the general elections may well assure that the electorate is better informed as to crucial issues and alternative positions which the voters may accept, reject, or utilize for comparison.

1983 Election. Of all the minor parties active in politics in the State of Washington, the Socialist Workers Party was the only one able to fulfill the requirements of R.C.W. 29.24.030 for placement on the ballot for the special 1983 senatorial election. It collected over 300 signatures on its nominating convention petitions. This evidences the "modicum" of community support for ballot placement of the candidates which may be constitutionally required.

Plaintiffs ran a serious campaign. They diligently attempted to take advantage of every opportunity to fulfill the requirements of the challenged statute, R.C.W. 29.18.110, to obtain ballot placement in the general election. Their efforts were unsuccessful. So have been the efforts of every other minor party attempting to obtain general election ballot placement in a state-wide campaign since the effective date of the challenged statute. The effect of the challenged statute has been to totally cleanse the ballots of the State of Washington, once so richly populated with contending ideas and philosophies, from any parties besides the Republican Party and the Democratic Party. The face that the vicissitudes of Democratic or Republican Party politics have led John Miller, King Lysen, and Jesse Chiang, established political figures not connected with any political programs or philosophies distinguishable from those of the Democratic or Republican parties, to run as "independents,"

when it seemed unlikely they would be able to win their major party nominations, in no way dilutes the detrimental effect of the challenged statute on minor parties' ability to participate in electoral politics, or the devastating effect on the electorate's range of choice in Washington State elections.

II. THE FUNDAMENTAL RIGHT TO BALLOT ACCESS REQUIRES STRICT SCRUTINY OF RESTRICTIONS ON THAT RIGHT

Ballot access restrictions burden two fundamental rights protected by the Constitution, (a) the right to political association, and (b) the right to cast votes effectively. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) (citing *Williams v. Rhodes,* 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 [1968]). The Supreme Court thus holds that when such "vital individual rights are at stake," the state must establish a "compelling interest" and must "adopt the least drastic means to achieve [its] ends." *Id.,* 440 U.S. at 184-185; *accord McLain v. Meier,* 637 F.2d 1159, 1163 (8th Cir. 1980). This is the traditional articulation of the test of strict judicial scrutiny that is applied when state laws burdening fundamental rights are analyzed. In other words, the state laws cannot stand unless they "further compelling state interests . . . that cannot be served equally well in significantly less burdensome ways." *American Party of Texas v. White,* 415 U.S. 767, 780, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974).

The long history of successfully conducted elections in the State of Washington under the significantly less restrictive ballot access provisions contained in R.C.W. 29.24—Nominations Other Than By Primary, clearly demonstrates the viability of less restrictive alternative means to accomplish all legitimate state goals. If the new 1977 addition of the primary hurdle in R.C.W. 29.18.110

is struck down, this will leave the R.C.W. 29.24 signature requirements which have been totally adequate through the past century in producing relatively open, but manageable, general election ballots.

III. THE RIGHT TO BALLOT ACCESS DOES NOT DEPEND ON LIKELIHOOD OF ELECTION TO OFFICE

> As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin v. Panish,* 415 U.S. 709, 716, 39 L.Ed.2d 702, 94 S.Ct. 1315 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." *Ibid.; Williams v. Rhodes, supra,* at 31, 21 L.Ed.2d 24, 89 S.Ct. 5. The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like minded citizens.

Anderson v. Celebrezze, 458 U.S. ___, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). "An election campaign is a means of disseminating ideas as well as attaining political office . . . . Overbroad restrictions on ballot access jeopardize this form of political expression." *Illinois Elections Board v. Socialist Workers Party,* 440 U.S. 173, 186, 59 L.Ed.2d 230, 99 S.Ct. (1979).

> The range of political views in our society cannot be compressed into the platforms of only two parties. Even where minor parties do not actually place candidates in office, their presence on the ballot provides disaffected voters with a means of protesting the status quo or of embracing unorthodox ideas. Developments in the Law—Elections, 88 Harvard L. Rev. 1111, 1123 (1975). The ballot box is our established means of effecting change, and excessive re-

strictions on it may redirect the pressure for change into other, less legitimate channels. While the three percent [signature] requirement imposes no direct limitation on the right to present a political philosophy or the right to associate and solicit new members, if the state has effectively eliminated a political party's access to the ballot, it has deprived the party of much of the substance of the values meant to be insured by the rights of free speech and association.

Vogler v. Miller, 651 P.2d 1 (Alaska 1982).

IV. A "WRITE-IN" CAMPAIGN IS NOT AN ADEQUATE SUBSTITUTE FOR BALLOT PLACEMENT

It is true of course that Ohio permits "write-in" votes for independents. We have previously noted that this opportunity is not an adequate substitute for having the candidate's name appear on the printed ballot.

> It is suggested that a write-in procedure under section 18600 et seq., without a filing fee, would be an adequate alternative to California's present filing fee requirement. The realities of the electoral process, however, strongly suggest that "access" via write-in votes falls far short of access in terms of having the name of the candidate on the ballot . . . . [A candidate] relegated to the write-in provision would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot.

Lubin v. Panish, supra, 415 U.S. at 719 n.5.

Indeed, in the 1980 presidential election, only 27 votes were cast in the State of Ohio for write-in candidates.

Anderson v. Celebrezze, supra, at 75 L.Ed. 564, n.26.

V. THE EFFECTS OF BALLOT ACCESS RESTRICTIONS ON MINOR PARTIES MUST BE EVALUATED SEPARATELY FROM THE EFFECTS ON "INDEPENDENT" CANDIDATES

Moreover, recognizing the different functions that

minor parties and independent candidates play in the political process, the Court has insisted that one is not a substitute for the other and that the difficulty of qualifying through one route cannot be justified by the openness of the other.

To the extent that minor parties are continuing organizations adhering to a basic ideology rather than vehicles for their principle candidates (*see generally* M. Duverger, *Political Parties* 290-291 (1965); V. O. Key, *supra,* n.6, at 280-281), they are likely to exist outside the mainstream of electoral politics, perhaps moreso than is typically true of independent candidates. From the standpoint of potential supporters, minor parties and independent candidates differ in that the latter are free from ties and obligations to party organizations, and support for them is not so total a commitment of political allegiance because it does not require renunciation of major party affiliation, *see Storer v. Brown,* 415 U.S. 724, 745-746 (1974); *but see* I.R. Gen. Laws Ann. § 17-15-24 (1969) (barring signers of independent candidate nominating petitions from voting in party primaries for 26 months), held unconstitutional, *Yale v. Curvin,* 345 F.Supp. 447 (D.R.I. 1972).

> *See Storer v. Brown,* 415 U.S. at 745-746. *American Party* implicitly adopted this view by evaluating the constitutionality of restrictions on independent candidates and those on minor parties separately.

Developments—Election, Law, 88 Harv.L.Rev. 1111, 1143 (1975).

VI. WASHINGTON LAWS ARE UNIQUELY RESTRICTIVE

A. Requiring Primary Votes is Qualitatively More Restrictive Than Requiring Nominating Signatures.

In upholding Georgia's nominating signature requirement, the United States Supreme Court in *Jenness v. Fortson,* 403 U.S. 431, 29 L.Ed.2d 554, 91 S.Ct. 1970 (1971), pointed out that "Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo."

The reasons included the following:

> Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions. A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a non-party candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who was not even registered at the time of the previous election. No signature on a nominating petition need be notarized.

The Court then went on to rely on the history of success of third party and independent candidates under Georgia election law as its basis for affirming the constitutionality of the law as applied in practice.

Footnote 10 in *Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) surveyed each state of the union's requirements for ballot access for third party candidates. Apparently no state had a requirement of *votes,* as opposed to *signatures.* The states surveyed had signature requirements as follows:

Signatures required as a percentage of electorate	*Number of states*
De minimis to 0.1%	16
0.1% to 1%	26
1.1% to 3%	3
3.1% to 5%	4

Thus, 42 out of the 50 states had *signature* requirements of 1% or less of those voting. State ballot access restrictions were more recently surveyed in "Developments—Election Law," 88 Harv.L.Rev. 1111 (1975), where the authors, in 1975, again foud no state requiring independents or minor parties to get a percentage of the *vote* in the primary to gain ballot access for the general election.

B. No Other State Requires Votes In Addition To Signatures For Ballot Placement.

As has been pointed out, the single other state which subsequently adopted a provision similar to Washington's, the State of Michigan, saw it struck down in *SWP v. Secretary of State,* 412 Mich. 571, 717 N.W.2d 1 (1982). Other courts have struck down similar added provisos attached to petition requirements. For example, the Sixth Circuit Court of Appeals affirmed a district court's order striking down the Kentucky election law requiring petition signers to declare that they "desire to vote" for the candidate in question, noting "the Supreme Court has never approved a declaration similar to the Kentucky 'desire to vote provision.' In fact, part of the reason why the Supreme Court approved the Georgia election law in *Jenness* was because that law *did not* require petition signers to state that they intended to vote for the candidate in the general election." *Anderson v. Mills,* 664 F.2d 600, 610 (6th Cir. 1981). Another federal district court struck down the North Carolina requirement that petition signers affiliate with the party whose candidate they were asking be placed on the ballot. *N.C. SWP v. N.C. State Board,* 538 F.Supp. 864 (E.D.N.C. 1982). Another court pointed out, in ordering Gus Hall and Angela Davis placed on the Michigan ballot as the Presidential candidates of the Communist Party:

> Defendants assert that although Hall conducted presidential campaigns in the past, he never received more than a few thousand votes in any given state. But electability is not an appropriate prerequisite for ballot access. The real question is whether there is enough support for placing a given candidate on the ballot, not whether there is enough support for electing the candidate. A large segment of the public may be determined never to vote for Hall and Davis yet may wish to see them on the ballot and support their effort to get put on the ballot. Another segment of the population may be attracted to Hall and Davis, may find their viewpoint appealing, and may even support their candidacy in various ways. Yet when the members of this sympathetic constituency finally enter the voting booth, they may decide to vote

> for candidates with a greater likelihood of success. Considering Hall and Davis's support in this sense—putting aside the question of their vote-getting ability—the court is bound to conclude that they have substantial community support.

Hall v. Austin, 495 F.Supp. 782, 790 n.12 (E.D.Mich. 1980). The court there pinpointed the precise defects in the Washington primary *vote* requirement, which confuses community support for ballot placement, with the much different criterion of electoral success, and may explain why the uniquely burdensome Washington system has not been adopted elsewhere, except in Michigan where it was struck down.

The Washington system also inappropriately relegates minor parties' already selected candidates to a primary election in which internal party politics of the major parties are what is at stake. "The purpose of a primary election is to narrow the field of candidates to one per party in order that the general election might be reserved for major struggles, not intraparty feuds." *Cross v. Fong Eu,* 430 F.Supp. 1036, 1038 n.2 (N.D.Ca. 1977), citing *Storer v. Brown,* 415 U.S. 724, 735, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974).

VII. THE WASHINGTON STATUTE, AS APPLIED, HAS TOTALLY EXCLUDED THIRD PARTIES FROM THE BALLOT

"The Constitution requires that access to the electorate be real, not merely theoretical." *American Party of Texas v. White,* 415 U.S. 767, 783, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974). Thus,

> [T]he state must provide a *feasible* opportunity for new political organizations and their candidates to appear on the ballot.

Storer v. Brown, 415 U.S. 724, 746, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). The test is:

> Could a reasonable diligent independent candidate be expected to satisfy the significant requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?

Id. at 742. The Court of Appeals in *McLain v. Meier,* 637 F.2d 1159 (8th Cir. 1980) struck down the North Dakota election laws as unreasonably restrictive where it had the effect of excluding third party groups from the ballot. The court explained:

> In *Storer v. Brown, supra,* the Supreme Court suggested that the experience of a "reasonably diligent . . . candidate" is a helpful if not unerring guide to the constitutionality of access requirements. "It is one thing if independent candidates have qualified with some regularity and quite a different matter if they have not *with some regularity.*" 415 U.S. at 742, [Emphasis added.]
>
> Here, the record shows that third parties have not qualified for ballot position in North Dakota with regularity, or even occasionally . . . .
>
> In sum, it seems clear to us that North Dakota's access requirements go beyond what is required by the state's valid interest in the effective functioning of the electoral process. The state may understandably and properly prevent the clogging of its election machinery with frivolous, fraudulent or confusing candidates. However, as the Supreme Court has noted, no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required. *Williams v. Rhodes, supra.* The remote danger of multitudinous fragmentary groups cannot justify an immediate and crippling effect on the basic constitutional right to vote for a third party candidate. Accordingly, we reverse the judgment of the district court upholding as constitutional North Dakota's ballot access requirements.

637 F.2d at 1165.

The Washington experience is similarly instructive. Appendix A demonstrates the long and successful history of minimally restrictive ballot access laws in Washington.

This came to a total halt in 1977. Normally, three to six parties have participated in state-wide races. There is no evidence that this clogged the election machinery or confused the voters. The one year prior to 1977 in which only two parties were on the ballot was 1952. This was not a political atmosphere of which we should feel proud. It may be one that our state legislators would like to recreate, but such nostalgia does not qualify as a compelling state interest to justify their doing so. "Even though the drafting of election laws is no doubt the handiwork of the major parties that are typically dominant in state legislatures, it does not follow that the particular interests of the major parties can automatically be characterized as legitimate state interests." *Anderson v. Celebrezze, supra,* at 75 L.Ed.2d 567, n.30.

The highest number of candidates ever nominated under the prior Washington procedure was 8, which occurred in 1936 and again in 1976, some forty years later. The number question was discussed in *Williams v. Rhodes,* 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5 (1968):

> As my Brother Black's opinion suggests, the only legitimate interest the State may invoke in defense of this barrier to third party candidacies is the fear that, without such a barrier, candidacies will proliferate in such numbers as to create a substantial risk of voter confusion. Ohio's requirement cannot be said to be reasonably related to this interest. Even in the unprecedented event of a complete and utter popular disaffection with the two established parties, Ohio law would permit as many as six additional party candidates to compete with the Democrats and Republicans only if popular support should be divided relatively evenly among the groups. And with such fundamental freedoms as stake, such an unlikely hypothesis cannot support an incursion upon protected rights, especially since the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion. As both Ohio's electoral history and the actions taken by the overwhelming majority of other states suggest, opening the ballot to this extent is perfectly consistent

> with the effective functioning of the electoral process. In sum, I think that Ohio has fallen far short of showing the compelling state interest necessary to overcome this otherwise protected right of political association.
>
> Since Ohio's requirement is so clearly disproportionate to the magnitude of the risk that it may properly act to prevent, I need not reach the question of the size of the signature barrier a state may legitimately raise against third parties on this ground. This should be left to the Ohio legislature in the first instance.

393 U.S. at 46 (Harlan, concurring).

VIII. CONCLUSION

The teachings of the Supreme Court on this issue are summed up in the vernacular aphorism: "If it ain't broke, don't fix it." And second, if is broke, the remedy must (a) hit the target and (b) not be overbroad, because

> Even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn v. Blumstein,* 405 U.S. at 343. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button,* 371 U.S. 415, 438 (1963). If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

Kusper v. Pontikes, 414 U.S. 51, 59, 194 S.Ct. 303, 38 L.Ed.2d 260 (1973).

The legislature clearly went too far in 1977 when it added the second step primary vote requirement to the historically tested first step signature requirements for ballot access. A decision by this court simply striking down the additional second step requirement will return the state to the system that worked so well from 1896 to 1977 (*see* Appendix A).

In short, the primary values protected by the First Amendment—"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Company v. Sullivan*, 376 U.S. 254, 270, 84 S.C. 710, 11 L.Ed.2d 686 (1964)—are served when election campaigns are not monopolized by the existing political parties.

Anderson v. Celebrezze, supra at 75 L.Ed. 561.

DATED December 9, 1983.

Respectfully submitted,
DANIEL HOYT SMITH, P.S.
Attorney for Plaintiffs

/s/ _____
Daniel Hoyt Smith

APPENDIX A

CANDIDATES FOR GOVERNOR
Washington State

Name	Party	Vote	Source
1896			
P. C. Sullivan	Republican	38,154	1
John R. Roger	Peoples Party	50,849	
R. E. Dunlap	Prohibition	2,542	
1900			
J. M. Frink	Republican	49,860	2
John R. Rogers	Democratic	52,049	
R. E. Dunlap	Prohibition	2,103	
William McCormick	Socialist Labor	843	
W. C. Randolph	Social Democratic	1,670	
1904			
Albert Mead	Republican	74,278	3
George Turner	Democratic	59,119	
William McCormick	Socialist Labor	1,070	
D. Burgess	Socialist	7,420	
Ambrosh Henry Sherwood	Prohibition	2,782	
1908			
Samuel G. Cosgrove	Republican	110,190	3
John Pattison	Democratic	58,126	
A. S. Caton	Prohibition	3,514	
George Boomer	Socialist	4,311	
1912			
M. E. Hay	Republican	96,629	4
Ernest Lister	Democratic	97,251	
Anna M. Maley	Socialist	37,155	
Abraham L. Brearcliff	Socialist Labor	1,369	
George F. Stivers	Prohibition	8,163	
Robert T. Hodge	Progressive	77,792	
1916			
Henry McBride	Republican	167,809	5
Ernest Lister	Democratic	181,645	
James E. Bradford	Progressive	2,894	
1920			
Louis F. Hart	Republican	210,662	6
W. W. Black	Democratic	66,079	
David Burgess	Socialist Labor	1,296	
Robert Bridges	Farmer-Labor	121,371	
1924			
Roland H. Hartley	Republican	220,162	7
Ben F. Hill	Democrat	126,447	
J. R. Oman	Farmer-Labor	40,073	
David Burgess	Socialist Labor	770	
Emil Hermann	Socialist	898	
William Gilmore	State Party	1,954	

1928			
Roland H. Hartley	Republican	281,991	8
Scott Bullit	Democrat	214,334	
James F. Skark	Socialist Labor	3,343	
Walter Price	Socialist	1,262	
Aaron Fyslerman	Workers Party	698	
1932			
John A. Gellatly	Republican	207,494	9
Clarence D. Martin	Democrat	353,215	
John F. McKay	Socialist	9,987	
Maslen Meade	Independent	378	
Edward Kriz	Socialist Labor	449	
L. C. Hicks	Liberty	47,710	
Fred E. Walker	Communist	2,532	
1936			
Clarence Martin	Democrat	466,550	10
Roland H. Hartley	Republican	189,141	
John F. McKay	Socialist	4,221	
Eugene Solie	Socialist Labor	466	
O. M. Nelson	Union	6,349	
Harold P. Brockway	Communist	1,939	
William Bouck	Farmer-Labor Commonwealth	1,994	
Malcolm M. Moore	Christian	1,947	
1940			
C. C. Dill	Democrat	386,706	10
Arthur B. Langlie	Republican	392,522	
P. J. Ater	Socialist Labor	426	
John Brockway	Communist	1,674	
1944			
Mon C. Wallgren	Democrat		3
Arthur B. Langlie	Republican		
Henry K. C. Gusey	Socialist Labor		
Allen Emmersen	Progressive		
1948			
Mon C. Wallgren	Democrat	417,035	11
Arthur B. Langlie	Republican	445,958	
Russell H. Fluent	Progressive	19,224	
Henry Killman	Socialist Labor	780	
Daniel Roberts	Socialist Workers	144	
1952			
Arthur B. Langlie	Republican	567,675	12
Hugh B. Mitchell	Democrat	510,657	
1956			
Emmett T. Anderson	Republican	508,122	13
Albert D. Rosellini	Democrat	616,987	
Henry Killman	Socialist Labor	4,163	
1960			
Lloyd Andrews	Republican	594,122	13
Albert D. Rosellini	Democrat	611,987	
Henry Killman	Socialist Labor	8,647	
Jack Wright	Socialist Workers	992	

1964			
Daniel J. Evans	Republican	697,256	14
Albert D. Rosellini	Democrat	548,692	
Henry Killman	Socialist Labor	4,326	
1968			
John J. O'Connell	Democrat	560,262	14
Daniel J. Evans	Republican	692,378	
Ken Chriswell	Conservative	11,602	
Henry Killman	Socialist Labor	1,113	
1972			
Rosellini	Democrat	630,613	14
Evans	Republican	747,825	
Gould	Taxpayer$	86,843	
Killman	Socialist Labor	2,709	
David	Socialist Workers	4,552	
1976			
John D. Spellman	Republican	687,039	15
Dixy Lee Ray	Democrat	821,797	
Henry Killman	Socialist Labor	4,137	
Art Manning	American Independent	12,406	
Evelyn Olafson	U.S. Labor	1,364	
Red Kelly	O.W.L.	12,400	
Patricia Bethard	Socialist Workers	3,106	
Maurice Woodrow Willey Jr.	Libertarian	4,133	
1980			
John Spellman	Republican	981,083	16
McDermott	Democrat	749,813	

Sources

1 Secretary of State Report 1893-6
2 Secretary of State 1899-1902
3 Abstract of Washington Territory and Washington State Votes 1865-1950
4 State of Washington, Abstract of Votes 1910-1914
5 State of Washington, Election Division Report 1913-1918
6 State of Washington, Election Division Biennial Report 1919-1922
7 State of Washington, Election Division Biennial Report 1923-24
8 State of Washington, Abstract of Votes General Election 1928
9 Washington State Abstract of Votes 1932, 1934
10 Washington State Secretary of State Abstract of Votes 1936-42
11 State of Washington Abstract of Votes 1948
12 State of Washington Official Abstract of Votes State General Election 1950-52
13 State of Washington Official Abstract of Votes State General Election 1954-62
14 State of Washington Abstract of Votes General Election 1964-74
15 State of Washington Abstract of Votes Primary and General Election 1976
16 State of Washington, Canvass of the Returns of the State of General Election 1980

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

AFFIDAVIT OF LISA HICKLER

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

STATE OF WASHINGTON
} ss.
COUNTY OF KING

Lisa Hickler, on oath, states as follows:

1. I am the chairperson of the Washington Socialist Workers 1983 Campaign Committee and make this affidavit in support of our Motion for Summary Judgment.

2. The political activity of the Socialist Workers Party, including electoral campaigns, is conducted with the purpose of changing which social class holds political power in the United States.

3. Socialist Workers Party election campaigns place candidates before the electorate who popularize this goal by:

a. elaborating a strategy for workers and their allies to break politically from the Democratic and Republican parties and create a party of the working class;

b. explaining that the policies of the Democrats and Republicans are designed, above all, to maintain the economic system of capitalism;

c. disseminating information about the social gains in countries where capitalism has been or is in the process of being overthrown, such as Cuba or Nicaragua;

d. explaining how the election of SWP candidates would be a step in the direction of establishing a workers and farmers government in the U.S. In this respect, the SWP calls special attention to the example of Mel Mason, an SWP member who was elected as a socialist to the City Council of Seaside, California.

4. The SWP has run in every presidential election since 1948 and in recent presidential elections has won ballot status in states containing the majority of U.S. voters. In the November 1983 elections the SWP nationally fielded 31 candidates in 11 states. Running election campaigns for national, state and local offices has been a permanent part of the SWP's strategy for winning political power in the United States.

5. The seriousness of the SWP's election campaigns is evident from two different points of view: the policies the SWP espouses and the efforts it makes to popularize its ideas and get its candidates elected to public office.

6. From the point of view of the policies the SWP advocates, the specific proposals of the Dean Peoples for U.S. Senate Campaign are detailed in the appended campaign brochure. They will not be repeated here. It should be clear that the program of the SWP involves a complete change in economic system and in government. Since the system the SWP advocates—socialism—is in various stages of implementation in countries comprising about one-third of the population of the earth, the charge of "non-seriousness" or "frivolity" which figures prominently in the public and legislative debate leading to the passage of the current state election law, can be motivated only by political hostility, not facts.

7. Evidence of the seriousness of SWP candidates in the State of Washington is apparent from the record of the Washington Socialist Workers 1983 Campaign Committee (hereinafter: Committee).

8. The Committee's first challenge was to win ballot status for the October 11 primary election for the seat vacated by the death of Senator Henry Jackson. This involved, within the time of one week:

a. selecting a candidate;

b. collecting the filing all necessary papers;

c. placing a legal notice for in advance and holding a nominating convention at which 304 people signed nominating papers for Dean Peoples.

d. producing a 1500-word campaign brochure in advance of the convention to inform nominees of Peoples' and the SWP's policies and program. This required an organizational effort that no other minor party or independent candidate was able to achieve.

9. The Committee organized and publicized three public meetings for Peoples' campaign:

a. a campaign open house—September 25, 1983

b. a campaign forum entitled "Will 'Buy American' Save Jobs?"—October 15, 1983

c. a campaign rally organized around the theme: "U.S. Hands Off Grenada Now!"—November 5, 1983

10. The Committee organized appearances for Peoples at various community meetings and radio and TV shows.

11. The Committee published and disseminated over 10,000 pieces of campaign literature through:

a. 48 visits to Seattle-area industrial plant gates;

b. mobilizing 12-15 campaign volunteers on each Saturday from September 24, 1983 through November 5, 1983.

12. The Committee organized three news conferences and published five news releases.

13. The Committee submitted two articles to the *Militant,* the SWP's national newspaper (circulation: 7,000) covering the activities and issues of Peoples' campaign.

14. The Committee raised and disbursed over $1900 to finance the activities outlined above. The entirety of

this activity took place between September 10, 1983, when the special election law was passed, and November 8, 1983, election day.

/s/ _____
Lisa Hickler

SUBSCRIBED AND SWORN to before me this _____ day of December, 1983.

_____
NOTARY PUBLIC in and for the State of Washington, residing at Seattle

Why not a worker for U.S. Senate?

Vote Socialist Workers Party!

Dean Peoples, SWP candidate for U.S. Senate and striking Todd shipyard worker. Member of IBEW Local 48.

The United States government is at war. U.S. warships are steaming off the coast of Nicaragua. 4,000 U.S. troops are on maneuvers in Honduras. Reagan has set up a bi-partisan war commission to provide cover for the deepening U.S. intervention in Central America and the Caribbean. The targets: the social revolution in El Salvador and the revolutionary governments of Nicaragua, Grenada and Cuba.

U.S. Marines are being killed defending the brutal Gemayel dictatorship in Lebanon.

The U.S. government supports the racist regime in South Africa. The U.S. war on Vietnam and Kampuchea continues with military threats and economic blackmail.

But this is only half the picture. The rulers of this country are also at war against working people at home. Workers in industry after industry face attacks on their standard of living and their union rights. The national guard has been used against striking miners in Arizona to bust their strike and herd scabs into the mines. The Metal Trades workers in Seattle were forced to strike by vicious contract demands aimed at gutting their unions. The shipyard workers are battling a similar boss attack.

Blacks and other minorities face job discrimination, racist violence, and attacks on busing, education, and affirmative action programs. The income gap between Black and white workers is the same as it was 20 years ago – Blacks earn only $.56 to every $1.00 earned by whites.

In Washington state, the chokehold has been used to murder Black prisoners, and the murderer of a Black U.W. student walks the streets – freed by an all-white jury. While Martin Luther King Way remains a dream, it took less than two weeks for Sea-Tac to become Henry Jackson International Airport.

Women still suffer from discrimination in hiring and pay, and attacks on abortion rights. Despite majority sentiment for the Equal Rights Amendment, the Democrats and Republicans have refused to pass the ERA. Women at City Light face discrimination and management-orchestrated harassment.

As social services are slashed, trillions of dollars pour into the sinkhole of the war budget. Unemployment hovers above 9 percent even with the economy in a "recovery."

Demands for "protectionist" legislation in the form of import duties and quotas, and the "buy American" campaign are not the solution to unemployment. These are reactionary campaigns to shift the blame for unemployment onto the backs of foreign workers.

Working farmers face staggering interest rates on loans, declining incomes and soaring costs. Migrant farm workers are exploited by unsafe working conditions and sub-minimum wages.

The employers and the government

PAGES 32-58 ARE OMITTED (newspaper articles and press releases attached to affidavit) FROM THE JOINT APPENDIX.

These were omitted because, as printed, they did not comply with this Court's Rules. (The type was too small).

These materials are found in the record, from the District Court as attachments to Affidvit of Lisa Hickler, CR-13.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND DISMISSAL

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

COMES Now Defendant Ralph Munro, Secretary of State of the State of Washington, by and through his attorney of record, Charles R. Hostnik, Assistant Attorney General, and hereby moves this court for summary judgment in his favor and an order of dismissal. This motion is based upon the attached Memorandum of Authorities in Support of Defendant's Motion for Summary Judgment and the files herein.

DATED this 9th day of December, 1983.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
Charles R. Hostnik
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

I. NATURE OF THE CASE

This action was filed by plaintiffs on October 18, 1983. The case was instituted for two reasons. First, plaintiffs sought a preliminary injunction directing the Secretary of State to place the name of the Socialist Workers Party candidate on the general election ballot. Secondly, plaintiffs sought to have RCW 29.18.110 declared unconstitutional.

The preliminary injunction issue was heard October 26, 1983. At that time this court orally denied the preliminary injunction.

On December 9, 1983 plaintiffs and defendant each filed a motion for summary judgment. Thus the merits of the case are now before this court.

II. ISSUE PRESENTED

The provisions of RCW 29.18.110 require minor party candidates to achieve one percent of the primary vote in order to have their name printed on the general

election ballot. The issue presented to this court is whether that requirement violates either First or Fourteenth Amendment rights.

III. STANDARD OF REVIEW

Plaintiffs assert violations of two constitutional rights—freedom of association and equal protection. See Complaint at p. 6, section 7.1. These rights are normally asserted in ballot restriction cases.[1]

Bullock v. Carter, 405 U.S. 134, 31 L.Ed.2d 92, 92 S.t. 849 (1972).

If the interests are fundamental, the state must show the classification is necessary to serve a compelling interest. If, however, the interests are not fundamental, minimum scrutiny is used to determine whether the statute has a rational relationship to a legitimate state interest. *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 184; Rada, Cardwell, and Friedman, "Access to the Ballot," The Urban Lawyer, vol. 13, p. 793 at 803.

The direct interest asserted by plaintiffs is the right of candidacy. Plaintiffs' purpose in filing this suit was to seek to have the name of the Socialist Workers Party candidate printed on the general election ballot. Candidacy has not been recognized by the United States Supreme Court as a fundamental right. *Bullock v. Carter, supra,* 405 U.S. at 142, 143.[2]

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[1]See: *Williams v. Rhodes,* 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5, 45 Ohio Ops 2d 236 (1968); *Jenness v. Fortson,* 403 U.S. 431, 29 L.Ed.2d 554, 91 S.Ct. 1970 (1971); *American Party of Texas v. White,* 415 U.S. 767, 39 L.Ed.2d 744, 94 S.Ct. 1296 (1974); *Storer v. Brown,* 415 U.S. 724, 39 L.Ed.2d 714, 94 S.Ct. 1274 (1974); *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 59 L.Ed.2d 230, 99 S.Ct. 983 (1979).

[2]In a later case, the court noted that the "right of a party or an individual to a place on a ballot is entitled to protection . . ." but the court stopped short of declaring the right to be fundamental. *Lubin v. Panish,* 415 U.S. 709, 39 L.Ed.2d 702, 94 S.Ct. 1315 (1974). Also see infra at p. 7.

Therefore the appropriate standard of review is that of minimum scrutiny. The defendants need only show that RCW 29.18.110 is rationally related to a legitimate state interest. If this is demonstrated, the statute must be declared constitutional.

IV. RCW 29.18.110 IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

A. Legitimate State Interests

The United States Supreme Court has validated several legitimate state interests in regulating ballot access. These have been variously described as: (1) preventing voter confusion,[3] (2) upholding the integrity of the election process,[4] (3) assuring the winner is the choice of at least a strong plurality of the voters, without the burden and expense of runoff elections,[5] and (4) requiring the candidate to demonstrate a "significant modicum of support" to test the seriousness of the candidate within the voting community.[6]

These related interests were recognized in *Lubin v. Panish, supra:*

> In *Bullock v. Carter* [supra] we recognized that the State's interest in keeping its ballots within manageable, understandable limits is of the highest order . . . A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence tend to impede the electoral process. . . . *The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not.*

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[3] *Lubin v. Panish, supra,* 415 U.S. at 715.
[4] *Storer v. Brown, supra,* 415 U.S. at 730.
[5] *Bullock v. Carter, supra,* 405 U.S. at 145.
[6] *Jenness v. Fortson, supra,* 403 U.S. at 442.

Lubin v. Panish, supra, 415 U S. at 715 (emphasis added); quoted with approval in *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 185.

Thus the State of Washington has a legitimate interest in restricting ballot access to candidates who have demonstrated public support.

The question now arises whether RCW 29.18.110 is a rational means of achieving the legitimate state interest.

B. RCW 29.18.110 Does Rationally Relate to the State's Legitimate Interests.

In 1977 the legislature revised the nomination procedures for minor parties. Laws of 1977, 1 ex. sess., ch. 329. The legislature was concerned, following the 1976 state general election, that the general election ballot was becoming cluttered by candidates who were unable to demonstrate any significant public support. A deliberate attempt was made to correct this situation without unnecessarily limiting the participation of minor parties in the election process.

Prior to 1977, minor party conventions were held on the same day as the state primary election. See Laws of 1965, ch. 9, sec. 29.24.020. Those who participated in a convention could not vote in the state primary. See Laws of 1965, ch. 9, sec. 29.24.040, 29.24.050. The minor party nominated its candidates at this convention, and those candidates were then placed on the general election ballot.

This system led to complaints by those voters who attended minor party conventions and therefore were unable to vote in the state primary for candidates not nominated by the minor party. Other administrative problems were inherent in this system.

Rather than increase the qualifying standard to nominate minor party candidates directly to the general election ballot, the legislature chose an approach where it would be relatively easy to qualify for the primary ballot,

but where a minimum showing of support would be required to be placed on the general election ballot. This approach gave those minor party or independent candidates who did appear on the general election ballot greater legitimacy in the eyes of the public and media. It also distinguished them from other minor parties or independent candidates who had not yet achieved that level of public acceptance.

The provisions of ch. 29.24 RCW govern nominations of minor party and independent candidates. There have only been eight nominations to statewide office under the provisions of ch. 29.24 RCW since 1977.[7] Three of these eight candidates have qualified for the general election ballot. In one of those cases, a candidate nominated under ch. 29.94 RCW received more votes in the general election than one of the major party candidates (Attorney General race, 1980 election).[8]

The 1977 amendments clearly do not bar minor party access to the general election ballot, and do rationally relate to the state's legitimate interest of restricting ballot access to candidates with demonstrated public support.

V. RCW 29.18.110 SURVIVES STRICT SCRUTINY

A. Applicability of Strict Scrutiny

Although the right of candidacy has not been declared to be a "fundamental" interest, the Supreme Court has indicated that the "right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters." *Lubin v. Panish, supra,* 415 U.S. at 716. Lower federal courts, however, have discussed the right to run for public office in terms of being "fundamental." *Mancuso v. Taft,* 476 F.2d 187 (1st

[7]This excludes the position of president where minor party candidates do appear on the general election ballot automatically because Washington has no presidential primary.

[8]See Affidavit of Donald F. Whiting, filed October 24, 1983.

Cir. 1973); *Duncantell v. City of Houston, Texas,* 333 F.Supp. 973 (S.D. Tex. 1971).[9] Neither of these are Ninth Circuit cases.[9]

Assuming arguendo fundamental rights are at issue here, RCW 29.18.110 must be necessary to serve a compelling state interest to be constitutionally valid. *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 184. Defendants do not concede, however, that this is the proper standard of review in this case.

B. Compelling State Interest

States have a judicially recognized compelling interest in protection of the integrity of its election process. *American Party of Texas v. White, supra,* 415 U.S. at 767, footnote 14. This includes the important state interest in requiring a preliminary showing of voter support before printing a candidate's name on the ballot. *Jenness v. Fortson, supra,* 403 U.S. at 442.

> . . . we think that the state's admittedly vital interests [of preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion] are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantrum of community support. So long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner.

American Party of Texas v. White, supra, 415 U.S. at 782, 783.

[9]Also see *Sorenson v. Bellingham,* 80 Wn.2d 547, 496 P.2d 512 (1972), in contrast with *Swanson v. Kramer,* 82 Wn.2d 511, 512 P.2d 721 (1973). The Alaska Supreme Court has indicated that no "fundamental" right of candidacy for public office exists. *Gilbert v. State,* 526 P.2d 1131 (Alaska 1974).

Washington's statutory scheme, embodied in RCW 29.18.110 is not only rational, but necessary to achieve this compelling state interest. Voters in the primary election have an opportunity to express their support for an entire minor party. Due to the blanket primary system,[10] voters also have an opportunity to show support for an individual candidate. The level of support required—one percent—is considerably lower than the five percent requirement upheld in *Jenness v. Fortson, supra.*[11]

Another aspect of the strict scrutiny test is that states must adopt the least drastic means to achieve their ends. *Lubin v. Panish, supra.* As discussed above, the legislature in amending RCW 29.18.110 has made it easier for voters to demonstrate support for minor parties enabling them to qualify for the general election ballot.

The current Washington scheme fulfills the least drastic criteria. The one percent primary vote requirement does not discriminate against minor parties as did the pre-1977 scheme. Voters are not forced into choosing to attend a minor party convention and thereby giving up an opportunity to vote for candidates either not nominated by the minor party or for candidates in races where the minor party had no nominee.

One alternative to the pre-1977 scheme was to increase the minor party convention requirements. But this also would have been more drastic than the one percent primary vote requirement. The requirements in RCW 29.18.110 were the least drastic means available.

In making the "least drastic" determination the court has also focused on whether the statutory scheme

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[10]See infra. at pp. 10, 11.

[11]The signature requirement in *Jenness v. Fortson, supra,* was five percent of the number of registered voters at the last general election. The one percent requirement of RCW 29.18.110 is based on the number of votes cast at the primary for all candidates for the position sought. Washington's requirement is considerably less since not all registered voters vote at primary elections.

operates as a complete bar to ballot access. Compare *Williams v. Rhodes, supra,* with *Jenness v. Fortson, supra,* and *American Party of Texas v. White, supra.* The nominating petition signature requirement in *Jenness* was upheld in part because write-in candidacy remained an alternative method of ballot access. The Court stated:

> It is to be noted that these [statutory] procedures relate only to the right to have the name of a candidate or a nominee of a "political body" printed on the ballot. There is no limitation whatever, procedural or substantive, on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted.

Jenness v. Fortson, supra, at 403 U.S. at 434.

The same is true of Washington's statutory scheme. See RCW 29.51.170; *Swanson v. Kramer,* 82 Wn.2d 511, 517, 512 P.2d 721 (1973). The challenged statute does not operate to completely bar minor parties from ballot access.

C. Michigan's Scheme is Distinguishable

Plaintiffs place heavy reliance upon *Socialist Worker's Party v. Secretary of State,* 412 Mich. 571, 317 N.W. 2d 1 (1982). The Michigan election scheme invalidated in that case placed a greater burden upon minor parties to qualify for the general election ballot that does Washington's scheme.

In general, a primary system can be one of three types: (1) a closed primary, (2) an open primary, or (3) a blanket primary. A closed primary is identified by registered voters of a particular party only being able to vote for candidates of their party. An open primary allows voters to vote a party ticket of any party, but they can vote for the candidates of only one party. A blanket primary allows voters to vote for one candidate position, regardless of party affiliation. See Mifflin, "Open Versus Closed Primaries: A Dilemna in the Illinois Election Process,"

1977 Southern Illinois University Law Journal, no. 1, p. 210, 218-221.

Michigan has an open primary system. Voters may vote for the candidates of one political party only or for the appearance of one new political party on the general election ballot. See MSA § § 6.1560(2)(3); 6.1575; 6.1576; *Socialist Workers Party v. Secretary of State, supra,* 317 N.W.2d at 3.

Washington has a blanket primary system. See RCW 29.18.200; 29.51.090. A voter may vote for any candidate for each position, regardless of the voter's or the candidate's party affiliation.

The result of Michigan's open primary system is more burdensome upon minor parties. Voters are more likely to vote a party ticket that contains a full slate of candidates for each available position. Major parties traditionally produce such a full slate, whereas minor parties do not. This penalizes minor parties.

In Washington, this danger is not present. The voter is presented with the full slate of candidates. A minor party candidate can be chosen for one position and a major party candidate can be chosen for positions where minor parties do not offer a nominee. Thus the burdens upon minor and major parties are equalized, and no equal protection violation is presented. *Anderson v. Millikin,* 186 Wash. 602, 59 P.2d 295 (1936). Moreover, the blanket primary is the least drastic means available to promote the legitimate state interest in allowing voters to support the candidates of their choice. *Heavey v. Chapman,* 93 Wn.2d 700, 705, 611 P.2d 1256 (1980).

In the case of the U.S. Senate vacancy at issue here, a special primary was conducted in Washington on October 11, and the only position on that primary ballot was for U.S. Senate. Voters were free to vote for any of the thirty-three candidates, including plaintiff Dean Peoples.

In a blanket primary system, such as Washington's, voters are not faced with statutorily limited ballot choices. Thus the gravamen of the Michigan Supreme

Court's decision in *Socialist Worker's Party v. Secretary of State, supra,* is not presented here.

VI. CONCLUSION

Minimum scrutiny is the proper standard of review in this matter. Under that standard, RCW 29.18.110 is rationally related to the legitimate state interest in restricting ballot access to candidates with demonstrated public support. The best method of demonstrating voter support is the primary vote.

Assuming arguendo that strict scrutiny review is proper, RCW 29.18.110 also meets that test. It is necessary to achieve the compelling state interest which Washington has in protecting the integrity of the election process by requiring some measure of public support from candidates. The primary vote requirement of RCW 29.18.110 is less drastic than the pre-1977 scheme, and is less drastic than the alternative of increased minor party convention requirements. In enacting RCW 29.18.110 the legislature made it easier for minor parties to qualify for the general election ballot. Several minor party candidates have so qualified under RCW 29.18.110.

Finally, due to the major differences in ballot access under the Michigan and Washington schemes, *Socialist Worker's Party v. Secretary of State, supra,* is not controlling in this case.

Defendant respectfully requests that summary judgment be rendered in its favor, and that an order of dismissal be entered.

DATED this 9th day of December, 1983.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
Charles R. Hostnik
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

DEFENDANT'S REPLY TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

COMES Now Defendant Ralph Munro, Secretary of State of the State of Washington, by and through his attorney of record, Charles R. Hostnik, Assistant Attorney General, and hereby replies to both plaintiffs' Motion for Summary Judgment and the Memorandum in Support of Summary Judgment submitted by amicus curiae ACLU. This reply is supported by three exhibits appended hereto. Exhibit A is an Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment. Exhibits B and C are pertinent archived records of the Senate and House committees (respectively) that dealt with the 1977 revisions to minor party election procedures.

I. STANDARD OF REVIEW

Defendant reiterates that the strict scrutiny test is not appropriate in this case because fundamental rights are not impacted. The right to vote itself is not affected by RCW 29.18.110. That statute does not restrict plaintiffs' access to the polling place. Likewise, RCW 29.18.110 does not restrict plaintiffs' ability to associate as a minor

political party. Plaintiffs' are free to so associate regardless of that statute. In fact the statute enhances plaintiffs' right to associate. See infra at p. 7.

The only direct right affected by RCW 29.18.110 is the right of candidacy. That right has not been declared to be fundamental by the U.S. Supreme Court. See Defendant's Memorandum of Authorities in Support of Defendant's Motion for Summary Judgment at pp. 3, 7. Since the right of candidacy is not fundamental, strict scrutiny is not appropriate. The state need only show RCW 29.18.110 is rationally related to a legitimate state interest.

The state does not here rely on mere incantation of a proper state purpose. In enacting RCW 29.18.110 the state legislature was concerned with at least two purposes: (1) enhancing the participation of minor parties in the election process, and (2) ensuring that minor parties had demonstrable public support. See Exhibit B, p. 13; Exhibit C, p. 2.

Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent. *McDonald v. Board of Election,* 394 U.S. 802, 809, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1968). Although the reported legislative history is scant concerning the purposes for enactment of the 1977 amendments, Senate and House committee records are helpful in this regard. See Exhibits B, C. Furthermore, grounds to exist to justify RCW 29.18.110. Clearly, the legislature intended to require minor parties to demonstrate some measure of public support, otherwise no reason would exist for placing those parties on the primary ballot.

II. THE 1977 AMENDMENTS AS ENACTED WERE THE LEAST RESTRICTING MEANS TO ACCOMPLISH THE STATE INTERESTS

Amicus curiae ACLU contends that the House ver-

sion of the 1977 amendments was less restrictive of the right to vote than the enacted version. Amici therefore concludes that RCW 29.18.110 was not the least restrictive means to accomplish the state interests and thus must be invalidated. See Amicus Curiae Memorandum in Support of Motion for Summary Judgment at pp. 8, 9. This analysis is flawed.

The provision relief upon by amicus is section 5 of the House version:

> The signature of a ((~~minor party~~)) *convention* nominating certificate of a person who voted in ((~~the primary~~)) *any other convention* held on the day of the convention is invalid. *Persons who sign convention petitions shall not be entitled to vote in the primary of any major political party held in September of the same year as the convention. Such persons shall, however, be entitled to vote an absentee ballot for any nonpartisan primaries and ballot proposition elections which may be held concurrently with such partisan primaries . . . .*

House Journal, vol. 1, pp. 497, 498 (Engrossed Substitute Senate Bill No. 2032, sec. 5, as amended by the House Committee on Elections and Governmental Ethics). The language quoted above was passed by the House and sent to the Senate. See House Journal, vol. 2, p. 1424; Senate Journal, vol. 1, p. 1593.

The Senate refused to adopt the House version and a conference committee developed the version of the bill that was enacted. See Senate Journal, vol. 1, pp. 1611, 1612; vol 2, pp. 2534-2542; House Journal, vol. 2, pp. 1990-1996.

The conference committee version (which was the version enacted) altered section 5 of the House amendments:

> The signature ((~~of~~)) *on* a ((~~minor party~~)) *convention* nominating certificate of a person who ((~~voted~~)) *signed a nominating certificate* in ((~~the primary~~)) *any other convention* held on the day of the convention is invalid.

Senate Journal, vol. 2, p. 2536; House Journal, vol. 2, p. 1991 (Engrossed Substitute Senate Bill No. 2032, sec. 5).

The conference committee also proposed an amendment to RCW 29.18.110, which the House had not done:

> No *name of a* candidate for a partisan office shall ((~~be the party nominee~~)) *appear on the general election ballot* unless he receives a number of votes equal to at least ((~~five~~)) *one* percent of the total number cast for all candidates for the position sought. . . .

Senate Journal, vol. 2, p. 2537; House Journal, vol. 2, p. 1992 (Engrossed Substitute Senate Bill No. 2032, sec. 11).

In summary, the House version proposed a scheme whereby minor party candidates would be chosen at a nominating convention and placed directly on the general election ballot. The delegates who attended the convention could vote at the primary (1) for nonpartisan positions, and (2) for ballot propositions. Delegates could not vote in any partisan position races.

This scheme was similar to the then existing law. The scheme in effect prior to 1977 required minor party conventions, with the party candidate placed directly on the general election ballot. But minor party convention delegates were prohibited from voting in the primary for any position or proposition.[1]

The enacted version removed all restrictions on the right to vote. Minor party convention delegates were free to vote in the primary for partisan and nonpartisan positions as well as ballot propositions. The enacted version also equalized the treatment of major and minor parties by requiring all such candidates to receive a certain percentage of the vote before appearing on the general election ballot. That percentage was reduced from five percent to one percent in order to make it easier for

[1]This scheme was in fact challenged on the basis that it denied minor party convention delegates the right to vote. See Exhibit A, p. 2.

minor parties to qualify for general election ballot placement.[2]

None of the three schemes impact the right to associate. Minor parties are free to associate in any manner they please. The three schemes presented here do not restrict that right. In fact, the enacted version enhances that right. See infra at p. 7.

Two of the three schemes do restrict the fundamental right to vote. The pre-1977 scheme completely disenfranchised from the primary those voters who attended minor party conventions. The House version, while not a complete ban, still partially disenfranchised primary voters. Under the House version voters who attended minor party conventions were prohibited from voting in all partisan races. Both schemes directly restrict the fundamental right to vote.

But the enacted scheme does not disenfranchise a single voter, and places no restrictions on the right to vote. Removing restrictions on that right was a primary purpose of the legislature in revising the minor party election procedures. See Exhibit A, p. 3, Exhibit B, pp. 9, 12, 32; Exhibit C, pp. 2, 8. The enacted scheme is clearly the least restrictive alternative.

III. THE ENACTED SCHEME ENHANCES THE PARTICIPATION OF MINOR PARTIES IN THE ELECTION PROCESS

In 1977 the legislature enacted a scheme that makes it relatively easy for a minor party to qualify for placement on the primary ballot. The legislature further required the minor party to demonstrate some showing of public support in order to be placed on the general election ballot.

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[2]The enacted version was also less restrictive than the original Senate Bill, which would not have lowered the five percent requirement for placement on the general election ballot. See Exhibit B, p. 29. Another alternative would have reduced the requirement to two percent—still more restrictive than the enacted version. See Exhibit B, p. 30.

The Secretary of State's Office had received complaints prior to 1977 that the then existing election scheme effectively barred minor party participation in the election process until close to the general election. See Exhibit A, p. 2. Since minor parties were not involved in the primary, media and candidate's forums were not available to minor party candidates until after the primary. Thus opportunities to disseminate minor party views were nonexistent for essentially half of the election season.

By including minor party participation in the primary, those avenues of expression are thus available to minor parties to enable them to disperse their views. The legislature made a conscious effort to do this. See Exhibit A, p. 3; Exhibit C, p. 2.

Furthermore, a minor party who qualifies for the general election ballot under RCW 29.18.110 has greater legitimacy in the eyes of the public. It has demonstrated the necessary modicum of public support. The minor party enjoys an enhanced public image that will help it promote its ideas.

IV. CONCLUSION

For the reasons discussed above, defendant respectfully requests the court to render summary judgment in its favor and to enter an order of dismissal.

DATED this 29th day of December, 1983.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
Charles R. Hostnik
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

AFFIDAVIT OF DONALD F. WHITING IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

STATE OF WASHINGTON
} ss.
COUNTY OF THURSTON

I, DONALD F. WHITING, being first sworn, state as follows:

1. I am the supervisor of elections in the office of the Secretary of State for the State of Washington, a position which I have held since April, 1974. As such, I am primarily responsible for carrying out the duties of the Secretary of State as the chief elections officer for the State of Washington. I make this affidavit in support of Defendant's Motion for Summary Judgment and Dismissal.

2. Prior to 1977, the office of the Secretary of State routinely received complaints from voters about the fact that the minor party nominating laws in effect at that time prevented persons who attended minor party nominating conventions (on the day of the primary) from voting on the nonpartisan candidates and issues which appear on the primary ballot. We received complaints

from the minor party conventions because they would not be able to vote on these offices and issues at the primary.

Prior to the 1976 state general election, these complaints culminated in a suit in federal court by the American Constitution Party alleging that the minor party nominating process in this state violated the equal protection provisions of the U.S. Constitution in that minor party delegates could not vote in the primary. The suit requested an injunction requiring county auditors to provide voters who wanted to attend minor party conventions with special absentee ballots containing only nonpartisan offices and issues.

We also received complaints from the minor political parties who felt that requiring them to hold their nominating conventions on the day of the primary restricted their opportunity to campaign because the broadcast media was not obligated to provide equal time for minor party candidates before the primary.

The legislation which the Secretary of State proposed to the Legislature in 1977 was intended, in part, to eliminate these objectionable aspects of the existing minor party laws.

3. I was personally involved in drafting the departmental request legislation on minor party nominating procedures and the final conference committee bill that was approved by the Legislature in 1977. Prior to the 1976 session of the legislature, we met with representatives of active minor political parties and identified four major "problems" with the statutes that were in effect at that time:

1) The prohibition against voting at the primary if an individual attended a minor party nominating convention;

2) The lack of a continuing legal existence of the minor party from one election to the next and the failure of minor party candidates to receive press attention until after the primary;

3) The difficulties encountered by county auditors in

preparing absentee ballots in a timely fashion (because minor party candidates could not be certified to them until two or three weeks after the primary); and

4) The difficulties encountered by the Secretary of State in producing and distributing the candidates pamphlet in a timely fashion (because information from minor party candidates was not available until two to three weeks after the primary).

Although individual senators and representatives frequently referred to, and even attacked, the Owl Party following the election in 1976, the drafters and prime sponsors of the legislation which was eventually approved by the Legislature were primarily concerned with the problems the existing minor party law caused for voters, election officials, and the minor parties themselves.

4. The House committee considered two alternative approaches to reforming the minor party nominating procedures. One bill retained the nominating convention but moved it to the Saturday before the filing period (the minor party candidates would appear only on the general election ballot). Under the other bill the minor political party would be formed by petition, its candidates would file at the same time as major party candidates, and they would appear on the ballot at the primary. The House adopted the first of these two alternatives; the Senate adopted the second.

The conference committee appointed to resolve the differences between the House and Senate bills chose a combination of these two proposals, retaining the convention but incorporating the requirement that minor party candidates appear on the primary ballot so that minor parties would have the same chance for media exposure as major party candidates. In the same compromise bill, they reduced the percentage of votes a primary candidate must receive in order to have his or her name printed on the general election ballot from five percent to one percent. Although this percentage had to be chosen without the advantage of hindsight, the concensus at that

time was that a modest qualifying standard of this type would help those minor parties which had significant support distinguish themselves from less serious parties.

5. According to the records of this office, the number of minor parties or independent candidate nominations for the past four presidential and non-presidential even-year elections are as follows:

Presidential Elections	Non-Presidential Elections
1980 – 8	1982 – 5
1976 – 12	1978 – 3
1972 – 7	1974 – 3
1968 – 6	1970 – 2

6. In the 1976, 1980, 1982, and 1983, the Socialist Workers Party nominated a candidate to the office of United States Senator. The votes for those candidates are as follows:

Year	Name Of Candidate	Votes Received	Percent Of Votes Cast For The Office
1976	Karl Bermann	7,402	.50%
1980	James Levitt	4,250	.45%
1982	Christopher Remple	3,006	.44%
1983	Dean Peoples	596	.08%

The Socialist Workers Party, Libertarian Party, and Free Peoples Party have had little difficulty meeting the requirements for formation of a party and little difficulty placing candidates for congressional and legislative office on the state general election ballot, but they have not been successful at qualifying candidates for the state general election ballot for statewide offices, such as U.S. Senate.

7. According to the records of this office, the voter turnout as a percent of registered voters for the past six even-year state primary and state general elections is as follows:

Presidential Elections			Non-Presidential Elections		
Year	Primary	General	Year	Primary	General
1980	48%	79%	1982	35%	62%
1976	44%	77%	1978	29%	52%
1972	49%	77%	1974	27%	55%

/s/ _____
Donald F. Whiting

Subscribed and sworn to before me this 29th day December, 1983.

/s/ _____
Notary Public in and for the State of Washington, residing at Olympia

PAGES 81-119 ARE OMITTED (Washington legislative materials including alternative bills, reports and correspondence) FROM THE JOINT APPENDIX.

These were omitted because, as printed, they did not comply with this Court's Rules. (The type was too small).

These materials are found in the record, from the District Court;Exhibits B and C to Defendant's Reply to Plaintiff Motion for Summary Judgement, CR-23.

Pages 81-119

While both the Senate and House proposals would correct the present provision, I am concerned that the present stalemate over the minor party process will result in no action being taken, and thus, no action to resolve the present constitutional problem. I therefore urge you, as the leader of your House, to urge cooperation between the Senate and House to resolve this matter.

Thank you for your time and attention.

Sincerely,

Bruce K. Chapman

xc: The Honorable Slade Gorton
The Honorable Gary Grant
The Honorable John Hawkins
Mr. Lyle Watson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

PLAINTIFFS' PROPOSED FINDINGS, CONCLUSIONS AND ORDER

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

This matter came on regularly for hearing before the Court on January 12, 1984, on cross-motions for summary judgment pursuant to Civil Rule 56 by Plaintiffs and Defendant. The parties both agreed that there were no disputed issues of material fact to be resolved, and each side asserted that they were entitled to the relief they requested as a matter of law.

Having considered the Pleadings, Memoranda of Law, the Affidavits of fact, the exhibits thereon, and the arguments of counsel, and being fully advised, the Court finds that summary judgment is appropriate under Rule 56, and enters the following:

FINDINGS OF FACT

1. Plaintiff Socialist Workers Party is a serious, non-frivolous, non-fraudulent, minor political party. Since its formation in 1938, the party has participated in the electoral process in the majority of the states of the union. It was regularly successful in placing its candidates on general election ballots in the State of Washington until the 1977 amendments to the minor party nomination

procedures which are the subject of this action.

2. In 1977, The Washington State Legislature amended the election laws in order to create additional barriers to minor party placement of candidates on the general election ballot. These amendments included the repeal of RCW 29.30.100, which previously provided for the general election ballot placement of the nominees of validly conducted minor party conventions pursuant to RCW 29.24. The amendment to RCW 29.18.020 put minor party candidates on the primary ballot instead of on the general election ballot. The amendment of RCW 29.18.110 barred the minor party nominees from the general election ballot unless they received in the primary election a number of votes equal to one percent of the total votes cast. An amendment to RCW 29.24.030 and .040, increasing the required number of attendees at minor party nominating certificates, is not challenged by the Plaintiffs, and requires minor party candidates to demonstrate a modicum of public support in order to have a valid nomination.

3. The effect of the 1977 amendments, as applied, has been to bar from the general election ballot in statewide races all minor party candidates, including the candidates of the Socialist Workers Party, from the effective date of the amendments through the present time.

4. The individual Plaintiffs Watson and Pitell are among the voters who wish to associate together to express their support for SWP candidates, including candidate Peoples, and the views that would be raised, debated and espoused in general election campaigns by SWP candidates. As a result of the effect in practice of the challenged new restrictions on minor party candidates, Plaintiffs have been limited to a choice of Democratic or Republican candidates on the general election ballot for statewide ballot.

5. Defendant Secretary of State, Ralph Munro, is the chief election officer of the State and has supervisory control over elections pursuant to R.C.W. 29.

6. The historical record indicates that for over eighty years prior to the 1977 amendments, minor parties were allowed to participate in statewide elections pursuant to the less restrictive convention nominating procedures for establishing a modicum of public support, as established by R.C.W. 29.24 and its predecessors. No evidence has been introduced to the record before this Court to establish any real or substantial voter confusion, clogging of the election machinery, or any other impairment of the integrity of the electoral process resulting from a proliferation of candidates, or from frivolous or fraudulent candidacies, which would justify additional restrictions on minor party ballot access.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter pursuant to the First and Fourteenth Amendments to the United States Constitution, 28 U.S.C. 1331, 1343, 1357, 2201, 2202 and 42 U.S.C. 1981 and 1982.

2. The challenged ballot access restrictions implicate fundamental rights, including rights of political association, political expression, and voting rights of the Plaintiffs.

3. There is insufficient evidence on the record to establish any real and substantial problem with clogging of the election machinery, voter confusion, fraudulent and frivolous candidacies, or any other impairment of the integrity of the electoral process, which would justify the challenged restrictions on fundamental rights of the Plaintiffs and similarly situated citizens of the State of Washington.

4. The historical record establishes a sufficiency of alternative, less restrictive, means to accomplish the legitimate state ends recited by Defendant in support of the challenged restrictions. Namely, the minor party nominating convention provisions of RCW 29.24, which are not challenged by Plaintiffs.

5. An evaluation of the historical record of the impact of the challenged restrictions, as applied, reveals that the restrictions have resulted in the total exclusion of minor party candidates from state-wide office since the effective challenged restrictions became effective in 1977.

6. Constitutional challenges to specific restrictions of a state's election laws cannot be resolved by any "litmus paper test" that will separate valid from invalid restrictions. The Court must consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiffs seek to vindicate. The Court must identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule. In passing judgment, the Court must both determine the legitimacy and strength of each of these interests, and also consider the extent to which these interests make it necessary to burden the Plaintiffs' rights. After weighing all these factors, it is clear to the Court that the challenged provision is unconstitutional.

7. "If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes,* 414 U.S. 51, 59 (1973). It is clear on the record before this Court that the more restrictive "double barrier" system established in 1977 was not justified by evidence which establishes the *necessity* of the additional burden on Plaintiffs' rights. Therefore, under the principles established by the controlling Supreme Court cases, the additional restrictions cannot stand.

8. Accordingly, judgment should issue declaring the challenged restrictions unconstitutional, and enjoining their enforcement in the future.

9. The Court will consider an application for reasonable attorneys fees by the prevailing party if brought before the Court on a separate motion.

ORDER

The provisions of R.C.W. 29.18.110, as applied to minor party candidates for statewide office, is hereby declared unconstitutional. Defendant is permanently enjoined from enforcing its one percent vote requirement for general election ballot access, as to minor party candidates lawfully nominated pursuant to the requirements of R.C.W. 29.24.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

ANSWER TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Defendant.

COMES Now Defendant Ralph Munro, Secretary of State of the State of Washington, by and through his attorney of record, Charles R. Hostnik, Assistant Attorney General, and hereby provides the court with its answer to plaintiffs' complaint for declaratory and injunctive relief. In answer to plaintiffs' complaint, the defendant admits, denies and alleges as follows:

I. INTRODUCTION

Defendant admits that plaintiffs have brought an action for declaratory and injunctive relief. The defendant denies all other allegations contained in Paragraph I.

II. JURISDICTION

Defendant admits that this court has jurisdiction under the provisions of 28 U.S.C. Sections 1331, 1343, and 1357. Defendant denies that this court has jurisdiction under the First and Fourteenth Amendments to the United States Constitution, as well as 28 U.S.C. Sections 2201, 2202 and 42 U.S.C. Sections 1981, 1983, and

specifically alleges that those statutes are not jurisdictional statutes.

III. PLAINTIFFS

3.1 In answer to Paragraph 3.1 of plaintiffs' complaint, defendant is without knowledge sufficient to form a belief as to the truth of the allegations contained therein and, therefore, denies Paragraph 3.1.

3.2 In answer to Paragraph 3.2 of plaintiffs' complaint, defendant is without knowledge sufficient to form a belief as to the truth of the allegations contained therein, therefore, denies Paragraph 3.2.

3.3 In answer to Paragraph 3.3 of plaintiffs' complaint, defendant admits that Plaintiff Dean Peoples was the Socialist Workers Party candidate for United States Senate in the 1983 election. Defendant further admits that Plaintiff Dean Peoples will be excluded from the general election ballot. Defendant affirmatively alleges that Plaintiff Dean Peoples will be excluded from the general election ballot because he did not receive 1 percent of the total votes cast for the office of United States Senate in the 1983 election, and therefore does not qualify for general election ballot placement pursuant to the provisions of RCW 29.18.110.

IV. DEFENDANTS

In answer to Paragraph IV. of plaintiffs' complaint, defendant admits that Ralph Munro is the Secretary of State of the State of Washington. Defendant further admits that Defendant Ralph Munro is the Chief Elections Officer of the state pursuant to the provisions of RCW 29.04.070. Defendant denies that Defendant Ralph Munro has supervisory control over election officials in the performance of their duties.

V. FACTS

5.1 In answer to Paragraph 5.1 of plaintiffs' complaint, defendant admits that Socialist Workers Party candidates have appeared on the Washington State ballot in every presidential election but one since 1948, including the 1980 presidential election. Defendant affirmatively alleges that since the State of Washington does not have a presidential primary, minor party candidates are automatically placed on the general election ballot, notwithstanding the provisions of RCW 29.18.110.

5.2 In answer to Paragraph 5.2 of plaintiffs' complaint, defendant admits that other minor parties have also availed themselves of the same method of qualification for the general election ballot. Defendant denies the remainder of Paragraph 5.2 of plaintiffs' complaint, and affirmatively alleges that the pre 1977 minor party nomination procedures did not function successfully and did impair the integrity of the electoral process, which was the reason that the legislature sought to amend the minor party nomination procedure in 1977.

5.3 In answer to Paragraph 5.3 of plaintiffs' complaint, defendant admits the same and affirmatively alleges that the provisions of Laws of 1977, 1st Ex. Sess., Chapter 329, Section 11, in amending RCW 29.18.110 reduced the qualifying percentage from 5 percent to 1 percent specifically for the benefit of minor parties. Defendant further affirmatively alleges that the 1977 amendments to the minor party nominating procedure contained in Laws of 1977, 1st Ex. Sess., Chapter 329, operated to place minor parties on the primary ballot specifically in order to increase their opportunity to campaign and to increase their exposure to the public and media.

5.4 In answer to Paragraph 5.4 of plaintiffs' complaint, defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5.4, and therefore denies the same.

5.5 In answer to Paragraph 5.5 of plaintiffs' complaint, defendant admits the same on information and belief.

5.6 In answer to Paragraph 5.6 of plaintiffs' complaint, defendant denies the same.

5.7 In answer to Paragraph 5.7 of plaintiffs' complaint, defendant admits that since 1977 from one to several minor parties have qualified for placement on the primary election ballot by fulfilling the requirements contained in Chapter 29.24 RCW. Defendant denies the remainder of Paragraph 5.7 of plaintiffs' complaint. Defendant affirmatively alleges that the 1977 amendments to RCW 29.18.110 do not bar any minor party candidates from placement on the general election ballot, because of the write-in provisions of RCW 29.51.170.

VI. DENIAL OF BALLOT ACCESS AND EFFECTIVE VOTE

6.1 In answer to Paragraph 6.1 of plaintiffs' complaint, defendant denies the same, and affirmatively alleges that RCW 29.18.110 does not create an insurmountable barrier to minor party placement on the general election ballot, due to the provisions of RCW 29.51.170. Defendant further affirmatively alleges that minor party access to public forms, debates, news media coverage, and other avenues of reaching the electorate with its ideas, and its right to associate the advancements of these ideas and to increase its electoral support, are in fact enhanced by the 1977 amendments to the minor party nomination procedure.

6.2 In answer to Paragraph 6.2 of plaintiffs' complaint, defendant denies the same, and hereby incorporates by reference the affirmative allegations made by defendant in response to Paragraph 6.1 of plaintiffs' complaint.

VII. CONSTITUTIONAL VIOLATIONS

7.1 In response to Paragraph 7.1 of plaintiffs' complaint, defendant denies the same.

VIII. PRELIMINARY RELIEF REQUIRED

In response to Paragraph VIII. of plaintiffs' complaint, defendant denies the same. Defendant affirmatively alleges that plaintiffs do have an adequate remedy other than this lawsuit, and that remedy is to utilize the write-in provisions of RCW 29.51.170. Defendants further affirmatively allege that if plaintiffs are granted the preliminary relief they request, the balance of hardships weighs heavily in defendant's favor because many Washington voters will be disenfranchised due to the fact they will not receive a new absentee ballot in time to have their vote counted in a November 8 general election.

WHEREFORE, defendant having fully answered plaintiffs' complaint, hereby requests the following relief:

1. For an order and judgment denying plaintiffs' prayer for relief and dismissal of plaintiffs' complaint with prejudice.

2. For defendant's costs and fees as provided by statute.

3. For defendant's reasonable attorneys fees as permitted by law.

4. For such other relief as the court may deem just and equitable.

DATED this 16th day of February, 1984.

KENNETH O. EIKENBERRY
Attorney General

/s/ _____
Charles R. Hostnik
Assistant Attorney General
Attorney for Defendnat Ralph Munro

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C83-697T

DEFENDANT'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

SOCIALIST WORKERS PARTY, et al.,

Plaintiffs,

v.

Secretary of STATE OF THE STATE OF WASHINGTON,
RALPH MUNRO,

Defendant.

FINDINGS OF FACT

I. IDENTITY OF PARTIES

1. Plaintiff Socialist Workers Party is a minor political party in the State of Washington, and has active branches in other states. [Plaintiffs' Affidavit of Ivan King, pp. 1, 2]

2. Plaintiff Dean Peoples was the Socialist Workers Party candidate for U.S. Senate in the 1983 election. [Plaintiffs' Affidavit of Dean Peoples, p. 1]

3. Plaintiffs Leroy Watson and Louise Pittell are apparently registered voters of the State of Washington.

4. Defendant Ralph Munro is the Secretary of State of the State of Washington.

II. PROCEEDINGS

5. A vacancy in the U.S. Senate was created by the death of Henry M. Jackson on September 1, 1983.

6. Due to the timing of that vacancy, the legislature was called into special session on September 10, 1983 and enacted a measure calling for a special primary election

on October 11, 1983. [Plaintiffs' Affidavit of Lisa Hickler, p. 3]

7. Plaintiff Dean Peoples was chosen as the candidate of the Socialist Workers Party at a street corner convention conducted on September 16, 1983. [P-I article Sept. 17, 1983, appended to Plaintiffs' Affidavit of Lisa Hickler]

8. The Office of the Secretary of State verified the necessary number of signatures on the certificate of nomination submitted by the Socialist Workers Party, and certified the name of Dean Peoples to appear on the primary election ballot. [Defendant's Affidavit of Donald F. Whiting, 2. 2]

9. Dean Peoples received 596 votes in the special primary election conducted on October 11, 1983. [Defendant's Affidavit of Donald F. Whiting, p. 5]

10. The number of votes cast in the special October 11 primary was 681,690. [Defendant's Affidavit of Donald F. Whiting, p. 5]

11. Plaintiff Dean Peoples did not receive enough votes in the primary election to have his name placed on the general election ballot. [Defendant's Affidavit of Donald F. Whiting, p. 5]

12. Plaintiffs instituted this action and sought a show cause hearing on why a preliminary injunction requiring defendant to print the name of Dean Peoples on the general election ballot should not be granted.

13. The show cause hearing was conducted October 26, 1983 and the preliminary injunction request was denied.

14. This matter was argued on January 12, 1984 pursuant to cross-motions for summary judgment filed by both plaintiffs and defendant.

III. PRE-1977 MINOR PARTY ELECTION PROCESS

15. Plaintiffs challenge the provisions of RCW 29.18.110, which requires candidates for partisan office to

obtain one percent of the vote at the primary election in order to have the candidate's name printed on the general election ballot.

16. That statute is part of a minor party election process last amended in 1977.

17. The pre-1977 election process was criticized on the basis that persons who attended minor party nominating conventions, which were required to be conducted on the day of the primary election, were prevented from voting for the nonpartisan candidates and issues that appeared on the primary ballot. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Exhibit A, p. 2]

18. The defendant Secretary of State received complaints from minor parties that under the pre-1977 election process voters were reluctant to attend minor party conventions because they would not be able to vote on nonpartisan offices and issues at the primary. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 2]

19. The American Constitution Party filed suit against defendant Secretary of State in 1976 alleging that the pre-1977 minor party nominating process in Washington violated the equal protection provisions of the U.S. Constitution in that minor party nominating convention delegates could not vote in the primary election. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 2]

20. Minor parties also complained to the Secretary of State that under the pre-1977 process the requirements that their nominating conventions be conducted on the same day as the primary election restricted their opportunity to campaign because the broadcast media was not obligated to provide equal time for minor party candidates before the primary. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 2]

IV. ALTERNATIVE METHODS

21. Due to the foregoing complaints and problems of the pre-1977 minor party nominating procedure, the drafters and prime sponsors of the legislation which was eventually approved by the legislature were primarily concerned with the problems the existing minor party law caused for voters, election officials, and the minor parties themselves. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

22. Two alternative approaches to reforming the minor party nominating process were considered by the legislature. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

23. One bill retained the nominating convention, but moved it to the Saturday before the filing period. This approach contemplated that minor party candidates would appear only on the general election ballot. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

24. The second approach required minor parties to be formed by petition, its candidates to file at the same time as major party candidates, and those candidates would appear on the primary ballot. [Defendant's Affidavit of Donald F. Whiting, in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

25. The State House of Representatives adopted the first approach and the State Senate adopted the second approach. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

26. A conference committee was appointed to resolve the differences between the House and Senate bills. The committee chose a combination of the two approaches, retaining the convention but incorporating the requirement that minor party candidates appear on the primary

ballot so that minor parties would have the same chance for media exposure as major party candidates. The committee also reduced the percentage of votes a primary candidate must receive in order to have his or her name printed on the general election ballot from five percent to one percent. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 4]

27. The conference committee version of the revised minor party nominating procedure was enacted by the legislature. [Laws of 1977, 1st Ex. Sess., ch. 329]

28. Based on the returns of the 1976 state general elections, eight of the twelve minor political parties which nominated candidates in 1976 would have qualified candidates for the general election ballot under the conference committee revised process. These eight minor political parties had a candidate that received more than one percent of the votes cast for the position sought. [defend's Reply to Plaintiffs' Motion for Summary Judgment: Exhibit B, p. 13; Exhibit C, pp. 5-7]

V. ELECTION RESULTS SINCE 1977

29. In 1978 there were no partisan statewide offices on the ballot at either the primary or general election. [Defendant's Affidavit of Donald F. Whiting, p. 2]

30. In 1980 non-major party candidates were nominated for three offices. The official results were as follows:

	Primary	General
UNITED STATES SENATE		
Gorton (R)	313,560	936,317
Magnuson (D)	348,471	792,052
Stokes (D)	18,348	
Levitt (SW)	4,250	
McCallum (R)	13,736	
McClain (R)	7,112	
Patric (D)	10,157	
Cooney (R)	229,178	
Kenney (L)	7,951	
	953,763	

Votes need to qualify for the general—9,528

	Primary	General
GOVERNOR		
Berentson (R)	154,724	
McGowan (R)	7,324	
Chapman (R)	70,875	
Ray (D)	234,252	
Bockman (SW)	2,833	
Spellman (R)	162,426	981,083
Diamond (D)	4,184	
Saluteen (R)	2,622	
McDermott (D)	321,256	749,813
Bestle (D)	2,481	
Baldwin (D)	3,578	
Jaisun (D)	1,476	
Isley (D)	2,723	
Sutich (R)	1,606	
	972,360	

Votes needed to qualify for the general—9,724

	Primary	General
ATTORNEY GENERAL		
Rosellini (D)	234,266	262,281
Miller (IC)	115,570	631,415
Neukom (D)	79,330	
Eikenberry (R)	284,459	769,116
Kaul (R)	39,178	
McCabe (D)	69,436	
Redman (D)	62,695	
	884,934	

Votes needed to qualify for the general—8,850

[Defendant's Affidavit of Donald F. Whiting, pp. 2, 3]

31. In 1982, the only partisan state-wide office on the ballot was for U.S. Senate. three non-major party candidates were nominated for that office. The official results were as follows:

	Primary	General
UNITED STATES SENATE		
Jackson (D)	450,580	943,655
Remple (SW)	3,006	
Lysen (IC)	31,186	72,297

Arthur Bauder (D)	4,762	
David (D)	6,764	
Stokes (D)	7,101	
Stites (R)	7,542	
Penberthy (R)	46,037	
Chiang (IC)	12,514	20,251
Doug Jewett (R)	73,616	332,273
McGowan (R)	13,054	
Privette (R)	3,221	
Patric (D)	5,408	
Talbott (R)	15,581	
	680,372	

Votes needed to qualify for the general—6,804

[Defendant's Affidavit of Donald F. Whiting, p. 4]

32. In 1983 the U.S. Senate vacancy was again the only partisan state-wide office on the ballot. Only one minor party attempted to place a candidate on the ballot. The official results were as follows:

	Primary
UNITED STATES SENATE	
Evans (R)	250,046
Lowry (D)	179,509
Larry Penberthy (R)	1,642
Curdy (D)	1,206
Stockton (D)	312
Peterson (R)	573
Garrett (D)	362
Bauder (D)	240
Patric (R)	211
Blair (D)	428
Privette (D)	223
Thompson (R)	382
Siebel (D)	339
Gee (D)	341
Royer (D)	103,304
McKinney (D)	964
Hetrick (R)	269
Maze (D)	341
Fix (R)	701
Cooney (R)	133,799
Olmer (D)	1,032
Blubaugh (R)	188

Maine (R)	105
Staloch (D)	620
Landon (R)	324
Yohey (D)	763
Stites (R)	162
Fuller (D)	495
Pilson (D)	266
Peoples (SW)	596
Chappelle (D)	473
Schilling (D)	743
Higgins (R)	730
	681,690

Votes needed to qualify for the general—6,817

[Defendant's Affidavit of Donald F. Whiting, pp. 4, 5]

33. In 1976, 1980, 1982, and 1983 the Socialist Workers Party nominated a candidate to the office of United States Senate. The votes for those candidates were as follows:

Year	Name Of Candidate	Votes Received	Percent Of Votes Cast For The Office
1976	Karl Bermann	7,402	.50%
1980	James Levitt	4,250	.45%
1982	Christopher Remple	3,006	.44%
1983	Dean Peoples	596	.08%

[Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A., p. 5]

34. The Socialist Workers Party and other minor parties have been very successful at qualifying candidates for the general election ballot in congressional and legislative races for non-statewide offices. [Defendant's Affidavit of Donald F. Whiting in Support of Defendant's Motion for Summary Judgment, Ex. A, p. 5]

CONCLUSIONS OF LAW

I. JURISDICTION

1. This court has jurisdiction over the parties and over the subject matter of this action pursuant to 28

U.S.C. § § 1331, 1343, and 1357.

2. The provisions of the First and Fourteenth Amendments to the United States Constitution do not confer jurisdiction on United States District Courts. *Kochhar v. Auburn University,* 304 F. Supp. 565 (M.D. Alabama 1969).

3. The provisions of 28 U.S.C. § § 2201 and 2202 are not jurisdictional statutes. *Jarrett v. Resor,* 426 F.2d 213 (9th Cir. 1970).

4. The provisions of 42 U.S.C. § § 1981 and 1983 also are not jurisdictional statutes. *Giles v. Equal Employment Opportunity Comm'n,* 520 F. Supp. 1198 (E.D. Missouri 1981).

II. PRELIMINARY MATTERS*

5. Defendant Ralph Munro, Secretary of State of the State of Washington is the State's chief election officer pursuant to the provisions of RCW 29.04.070.

6. Plaintiff Dean Peoples did not receive a sufficient number of votes in the primary election to qualify for placement on the general election ballot pursuant to the provisions of RCW 29.18.110.

III. ISSUE PRESENTED

7. The issue presented to this court is whether rights granted by either the First or Fourteen Amendments to the U.S. Constitution are violated by the requirement of RCW 29.18.110 that candidates for partisan political office must receive at least one percent of the total votes cast for the office in the primary election in order to qualify for placement on the general election ballot.

8. Plaintiffs do not challenge the constitutionality of RCW 29.18.110 on its face, but only challenge that statute as it applies to minor political parties, specifically, the Socialist Workers Party.

IV. STANDARD OF REVIEW

9. Plaintiffs assert violations of two constitutional rights—freedom of association, based on the First Amendment, and equal protection, based on the Fourteenth Amendment. These rights are normally asserted in ballot restriction cases. *See Williams v. Rhodes,* 393 U.S. 23, 21 L.Ed.2d 24, 89 S. Ct. 5, 45 Ohio Ops 2d 236 (1968); *Jenness v. Fortson,* 403 U.S. 431, 29 L.Ed.2d 554, 91 S. Ct. 1970 (1971); *American Party v. Texas v. White,* 415 U.S. 767, 39 L.Ed.2d 744, 94 S. Ct. 1296 (1974); *Storer v. Brown,* 415 U.S. 724, 39 L.Ed.2d 714, 94 S. Ct. 1274 (1974); *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 59 L.Ed.2d 230, 99 S. Ct. 983 (1979).

10. The standard used to review the challenged statute in ballot access cases hinges upon whether the interests involved are "fundamental." Not every limitation or incidental burden on ballot access is subject to a stringent standard of review. *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92, 92 S. Ct. 849 (1972).

11. If the interests are deemed to be fundamental, the State must show the classification is necessary to serve a compelling interest. If, however, the interests are not fundamental, minimum scrutiny is used to determine whether the statute has a rational relationship to a legitimate State interest. *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 184; Rada, Cardwell, and Friedman, "Access to the Ballot," The Urban Lawyer, vol. 13, p. 793 at 803.

12. The direct interest asserted by plaintiffs is the right of candidacy. Plaintiffs' purpose in filing this suit was to seek to have the name of the Socialist Workers Party candidate printed on the general election ballot. Moreover, the only direct right affected by RCW 29.18.110 is the right of candidacy.

13. The right of candidacy has not been recognized by the United States Supreme Court as a fundamental right. *Bullock v. Carter, supra,* 405 U.S. at 142, 143.

14. Since the right of candidacy is not fundamental, strict scrutiny is not appropriate in this case. The defendant Secretary of State need only show that RCW 29.18.110 is rationally related to a legitimate State interest. If this is demonstrated, the statute must be delcared constitutional.

V. LEGITIMATE STATE INTERESTS

15. The United States Supreme Court has identified various legitimate interests that a state has in regulating ballot access. Among these interests is a legitimate state interest in requiring a candidate to demonstrate a "significant modicum of support" within the voting community. *Jenness v. Fortson, supra,* 403 U.S. at 442.

16. The State of Washington, therefore, has a legitimate interest in regulating ballot access to those candidates who have shown they have a "significant modicum" of public support.

17. The question that remains is whether RCW 29.18.110 is a rational means of achieving this legitimate state interest.

VI. RATIONAL RELATIONSHIP

18. The provisions of chapter 29.84 RCW govern nominations of minor party and independent candidates. There is no difference in the nominating procedure between minor party candidates and independent candidates.

19. Since the 1977 amendments to the minor party nominating procedure, there have been only eight nominations of minor party candidates to State-wide office. Three of these eight candidates received a sufficient showing of public support to quality for the general election ballot under RCW 29.18.110.

20. Based on the 1976 election returns, eight of the twelve minor party candidates would have qualified for general election ballot placement under RCW 29.18.110.

21. Moreover, minor party candidates are guaranteed ballot access in primary elections under Washington's minor party nomination procedure. Under the proisons of chapter 29.24 RCW, the minor party chooses its candidates, and that candidate is placed automatically on the primary ballot.

22. The facts presented to this court demonstrate that the strength of the individual candidate is to a large extent responsible for whether that candidate qualifies for placement on the general election ballot. It is even possible for a minor party candidate to receive more votes than a major party candidate. *See* Finding of Fact 30 (Attorney General race).

23. RCW 29.18.110 rationally relates to the legitimate State interest of forcing candidates to demonstrate some measure of public support.

VII. ALTERNATIVE STANDARD OF REVIEW

24. Although the right of candidacy has not been declared to be a "fundamental" interest, the Supreme Court has indicated that the "right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." *Lubin v. Panish,* 415 U.S. 709, 716, 39 L.Ed.2d 702, 94 S. Ct. 1315 (1974).

25. Lower federal courts have discussed the right to run for public office in terms of being "fundamental." *See Mancuso v. Taft,* 476 F.2d 187 (1st Cir. 1973); *Duncantell v. City of Houston, Texas,* 333 F. Supp. 973 (S.D. Tex. 1971).

26. Assuming the right to candidacy is a fundamental right, defendant Secretary of State must show that RCW 29.18.110 is necessary to serve a compelling State interest.

VIII. COMPELLING STATE INTEREST

27. As noted above, the State of Washington has a

legitimate interest in regulating ballot access to those candidates who have shown they have a "significant modicum" of public support. *See* Conclusions of Law 15, 16.

28. This State interest is not only legitimate, but is also a compelling State interest.

29. The question that remains is whether RCW 29.18.110 is necessary to achieve this compelling State interest.

IX. NECESSITY OF RCW 29.18.110

30. Minor party candidates are guaranteed ballot access in primary elections under Washington's minor party nomination procedure. Under the provisions of chapter 29.24 RCW, the minor party chooses its candidate, and that candidate is placed directly on the primary ballot. Therefore, this case does not present a situation where minor parties are totally barred from participation in elections.

31. Under Washington's blanket primary scheme, voters are free to express support for a minor party, or for a candidate of a minor party, without restrictions due to the voter's party affiliation.

32. Without RCW 29.18.110, the State would have no mechanism to achieve its compelling interest in requiring minor party candidates to demonstrate some measure of public support.

33. RCW 29.18.110 is necessary to achieve the State's compelling interest in requiring minor party candidates to demonstrate some measure of public support.

X. LEAST DRASTIC MEANS

34. The Supreme Court, under the strict scrutiny test, has required a challenged statute to be the least drastic means to achieve the desired ends. *Illinois State Board of Elections v. Socialist Workers Party, supra.*

35. The conference committee version of the 1977 amendments to the minor party nominating procedures was the least drastic of the alternative measures considered by the legislature. The conference committee version was the measure enacted and contained in RCW 29.18.110 in the form challenged here.

36. The enacted version of the 1977 amendments was also less restrictive than the pre-amendment minor party nominating procedure. The amended version removed all restrictions on the right to vote. Primary voters are now free to vote for any candidate for an office, regardless of whether they attended a minor party nominating convention. Under the pre-amendment version, primary voters who attended a minor party convention were prohibited from voting for any partisan positions on the ballot.

37. Moreover, RCW 29.18.110 does not operate to completely bar a minor party candidate from the general election ballot if the candidate did not receive one percent of the vote in the primary. That candidate still has access to the general election ballot via the write-in provisions of RCW 29.51.170.

38. The case of *Socialist Workers Party v. Secretary of State,* 412 Mich. 571, 317 N.W.2d 1 (1982) is not binding on this court. Even if it were, however, that case is distinguishable. Michigan has an open primary, which forces voters to vote a party ticket. Since the facts in this case show that minor parties traditionally have run less than a full slate of candidates, voters who wish to fully exercise their right to vote are more likely to vote a major party ticket. This places minor parties at a disadvantage that is not present in Washington's blanket primary system, where voters are free to vote for one candidate for each office, regardless of party.

39. RCW 29.18.110 is the least drastic means of accomplishing the State's compelling interest.

XI. CONCLUSION

40. RCW 29.18.110 either on its face or as applied does not bar minor party access to the ballot.

41. RCW 29.18.110 does not violate rights guaranteed by either the First or Fourteenth Amendments to the United States Constitution.

42. Accordingly, an order should be issued granting defendant's Motion for Summary Judgment.

ORDER

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is granted the Plaintiff's Motion for Summary Judgment is denied.

/s/ _____
HONORABLE JACK E. TANNER
United States District Judge

Submitted by:
KENNETH O. EIKENBERRY
Attorney

/s/ _____
Assistant Attorney General
Attorneys for Defendant
Dated: 2/16/84

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-3806

SUPPLEMENTAL CITATION 1984 WASHINGTON ELECTION RESULTS

SOCIALIST WORKERS PARTY; LEROY WATSON; LOUISE PITTELL; and DEAN PEOPLES,
Plaintiffs-Appellants,

v.

Secretary of STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,
Defendant-Appellee.

I, Ralph Munro, Secretary of State of the State of Washington and custodian of its seal, do hereby certify that the attached is an accurate listing of those candidates filing declarations of candidacy and supplemental nominating petitions with this Office for the 1984 Washington State Primary, pursuant to RCW 29.24.040, together with indication of which of those candidates qualified to be placed on the general election ballot by virtue of having received at least one per cent (1%) of the votes cast for that office (pursuant to RCW 29.18.110).

DATED:

Given under my hand and the seal of the State of Washington, at Olympia, the State Capitol.

/s/ _____
LAURA ECKERT
Assistant Secretary of State

MINOR PARTY–INDEPENDENT CANDIDATES
STATE OF WASHINGTON
1984 ELECTION

Qualified For Primary	Qualified For General	Elected	Party/Affiliation	Name	Office
*	*		Libertarian	Karen ALLARD	State Rep., Dist. 26, pos. 1
*	*		Taxpayers	Duane ALTON	State Senate, Dist. 5
*	*		Libertarian	Mack BARNETTE	State Treasurer
*	*		Libertarian	Dan BLACHLY	U.S. Rep., 2nd Dist.
*	*		Libertarian	Dean BRITTAIN	State Rep., Dist. 40, pos. 1
*			Independent	Mark CALNEY	Governor
*	*		Populist	Gary FRANCO	U.S. Rep., 2nd Dist.
*			Socialist Workers	Cheryll HIDALGO	Governor
*	*		Independent	Wm. L. JENNINGS	Comm. Public Lands
*	*		Communist	Elmer KISTLER	State Rep., Dist. 37, pos. 1
*	*		Independent	Alan KRONSCHNABEL	County Commissioner Dist. 3 (Chelan)
*			Populist	Bob LEROY	Governor
*	*		Populist	Thorn LOVELACE	County County Dist. 6 (Pierce)
*	*		Socialist Workers	Mark MANNING	U.S. Rep., 7th District
*	*		Independent	James M. SCIDMORE	County Commissioner Dist. 1 (Skagit)
*	*	*	Independent	George TOUCHETTE	County Commissioner Dist. 2 (Columbia)

December 7, 1984

Clerk of Court
Court of Appeals
for the Ninth Circuit
P.O. Box 547
San Francisco, CA 94101

Re: *Socialist Workers Party et al. v. Secretary,*
CA NO. 84-3806

Dear Sir:

Pursuant to the Court's order of December 4, 1984, I am writing this response to the Appellee's Supplemental Citation on 1984 Washington State election results.

While Plaintiffs were served with the "Supplemental Citation" of facts alleged to support the state's position sometime after the beginning of the calendar on the date set for oral argument, Plaintiffs do not assert the obvious untimeliness as a reason to disregard any facts relevant to the issues of this case. The list submitted is obviously not an official record kept in the course of business, but rather something prepared by counsel or by the office of the Defendant himself for the purposes of litigation. It is likewise incomplete, giving no indication of the number of votes cast, or of the percentages gained by the various candidates in the assorted races on the list. Its import is therefore somewhat obscure.

There is one relevant point that can be drawn from this exhibit, however, which Plaintiffs wish to emphasize: *three out of the four candidates for statewide office were eliminated from the general election ballot by the challenged primary requirement.* This is consistent with the facts before the District Court, indicating that four out of the four previous minor party candidates for statewide office attempting to qualify had likewise been eliminated from the ballot. Adding the results together, the total result is that seven out of the eight minor party candi-

dates have been disqualified in statewise races. Plaintiffs have made clear from the beginning the object of the challenge:

> These amendments have since their adoption effectively barred all minor parties from participating in general election for state-wide office.

ER 1, 1, lines 19-21, Complaint for Declaratory And Injunctive Relief. This fact was admitted by the Defendants, in the Affidavit of Don Whiting, attached as an exhibit to their Memorandum in Support of Summary Judgment:

> [Minor parties] have not been successful at qualifying candidates for the state general election ballot for state-wide offices, such as U.S. Senate.

ER, Docket 16, Exhibit A, page 5, lines 24-26. Vote totals are set forth in the initial Affidavit of Don Whiting, Docket No. 7, Clerk's Papers (not in Excerpt of Record) 2-5. These figures show that only 4 candidates for statewide office between the enactment of the challenged amendments and the trial court hearing (Remple, Socialist Workers, '82 Senate; Levitt, Socialist Workers, '80 Senate; Kenney, Libertarian, '80 Senate; Bockman, Socialist Workers, '80 Governor) all of which were eliminated from the ballot. It has never been an issue that minor party candidates for local offices have usually been able to meet the one percent requirement, and congressional candidates about half the time. This in no way justifies the exclusionary rule in statewide races.

Our conclusion is that the "Supplemental Citation" of facts on appeal in no substantial way changes the import of the facts before the trial court. The state has failed to offer competent evidence sufficient to carry its heavy burden to justify the restrictions on First Amendment rights, either at the trial court or here. There is no basis for a remand, which would be futile. This court must make a *de novo* decision on the record before it. The

Plaintiffs' summary judgment motion should be granted and Defendants' should be denied.

Respectfully submitted,

SMITH & MIDGLEY
Professional Service Corporation

/s/ _____
Daniel Hoyt Smith
Of Attorneys for Plaintiffs